IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO. 7564 OF 2006

Leena Roger Nunes .... Petitioner

versus

Bassein Catholic Co-op. Bank Ltd.
and others ..... Respondent.

Shri Anilkumar Patil with Sachin Pawar, Nitin Meshram and Himanshu Mahajan for petitioner.

Mr. B.A.D'Lima with Mrs. I.M.D'Lima i/b. M/s. D'Lima & Associates for Respondent no.1.

Mrs. Prachi Collaco i/b. M/s. Le-Roy Collaco & Associates for Respondent nos. 7 and 8.

Ms. V.S.Mhaispurkar AGP for Respondents 2 and 6.

CORAM; A.P. DESHPANDE, J.
DATED; 19TH SEPTEMBER, 2007

P.C.;

1. Rule. Rule made returnable forthwith. Taken up for final hearing by consent of parties.

2. One M/s. Sunbeam Enterprises, which is a partnership firm, and respondent no.3 in the petition, had borrowed a sum of Rs. 15 lacs from the respondent no.1 Co-operative Bank. Admittedly, the present petitioner is a guarantor for the re-payment of the loan amount and interest thereon. As the borrower did

not repay the loan amount as agreed, the respondent no.1 bank initiated proceedings under section 101 of the Maharashtra Co-operative Societies Act against the borrower so also the guarantor. The respondent no.2 issued recovery certificate against the borrower and the guarantor for recovery of an amount of Rs.17,45,379/-. In execution of the said recovery certificate, the property of the petitioner namely non-agriculatural land admeasuring 52.5 gunthas from survey no.52 at village Sativali, Tal.Palghar, District Thane came to be attached.

3. It is the case of the petitioner that the plot of land which is attached for realising the amount covered by recovery certificate, was not mortgaged with the bank. It is further submitted that three flats owned by the borrower were mortgaged with the respondent no.1 bank but the bank instead of proceeding against the mortgaged property, has proceeded to attach the property belonging to the guarantor, referred to herein above. I need not deal with this submission canvassed by the learned counsel for the petitioner, in view of occurance of subsequent developments, referred to hereafter. The property which was attached by the Recovery Officer of the bank was put to auction. The auction was held on 29-3-2005. There was only one bidder/the respondent

no.3 i.e. the partnership firm of which respondent nos. 7 and 8 are the partners. The bid of the purchaser was for an amount of Rs.23 lacs. I may hastened to add that though the auction was held on 29-3-2005, the purchaser has made the payment of the bid amount in the following manner.

1. Earnest money of Rs.10,000/- ..on 29-3-2005.
2. A sum of Rs. 4,50,000/- ..on 28-9-2005.
3. A sum of Rs. 2,00,000/- ..on 5-10-2005.
4. A sum of Rs. 4,86,000/- ..on 31-3-2006.
5. A sum of Rs.1,64,000/- ..on 24-4-2006.
6. And final balance amount of Rs.9,90,000/- ..on 26-5-2006.

4. It will be as such evident that the auction purchaser has made various deferred payments over a period of more than one year. A bare perusal of Rule 107 of the Rules and to be more precise sub rule 11(g) would reveal that a sum equal to 15% of the price of the immovable properties has to be deposited by purchaser immediately with the Sale Officer at the time of purchase. In default of such payment the property is required to be resold. clause (h) reads as under:

"The remainder of the purchase money and the

amount required for the general stamp for the sake certificate shall be paid within fifteen days from the date of sale."

The first proviso to clause (h) vests the Recovery Officer with a discretion to extend the period for deposit of the cost of stamp by a further period of 30 days from the date of sale. Clause (i) then provides that in default of payment within the period mentioned in the last proceeding clause the deposit may be forfeited to the State Government. What is relevant to note is that there is obligation cast on the purchaser to pay 15% of the amount immediately on sale and pay the balance of the amount within 15 days from the date of sale. Failure on the part of the purchaser to pay the said amount in the manner mandated by Rule 107 would result in forfeiture of the purchaser’s right in the immovable property, on the same being resold, is further provided in clause (j). It is thus clear that the purchaser has not deposited the amount as mandated by Rule 107. It is also undisputed and the learned counsel for the Bank make a categorical statement that till date neither sale certificate has been issued in favour of the purchaser nor the sale has been confirmed.

5. In the above factual background it is submitted

that by now the petitioner has paid the entire amount recoverable by the bank under the recovery certificate and thus a submission is made to set aside the auction sale and for release of the property from the attachment. The learned counsel for the respondent no.1 Bank admits to have received the entire amount due and recoverable under the recovery certificate. The counsel for the petitioner submits that he has paid an amount, of Rs. 1,49,904/-, over and above the recovery certificate, which includes the surcharge and other charges. The learned counsel for the petitioner then submits that without prejudice to his right to proceed against the bank in respect of the amount paid by the petitioner over and above the recovery certificate, the property be freed from the attachment. The learned counsel for the bank as well submits that as the petitioner has paid the entire amount, the property can be released from attachment. The learned counsel for Respondent nos. 7 and 8, the purchasers, submits that since beginning the purchasers were asking the bank to co-operate but as the bank did not co-operate, the payment has not been made as is required by Rule 107 of the Rules. Whatever may be the reason for belated payments, one thing is sure that no right has been created in the purchaser in the teeth of violation of provisions of Rule 107. The Recovery Officer of the bank could not

have permitted the purchaser to pay the amount in the fashion it has been paid. The Recovery Officer as well is guilty of failure to seek compliance of Rule 107 from the purchaser. Hence, it would be just and fair to return the entire amount received by the Recovery Officer of the bank to the purchaser which the purchaser has deposited with the bank. This exercise would be in furtherance of the cause of justice.

6. Before I part with the petition, it need to be stated that the petitioner had filed revision before the Divisional Joint Registrar calling in question the legality and validity of the Recovery Certificates issued by the Assistant Registrar. However, as there was delay in filing of the revision, the petitioner has filed an application for condonation of delay in filing the revision and rejection of the said application has given rise to the filing of the present writ petition.

7. At a subsequent point of time one more revision came to be filed by the petitioner, wherein the auction sale of the petitioner’s property has been challenged. Having regard to the developments which took place pending the present writ petition, such as payment of entire amount by the petitioner to the bank

and the belated payments made by the purchaser, I deem it appropriate to decide the writ petition on merit without relegating the parties to the alternate remedy of revision before the Divisional Joint Registrar. The learned counsel makes a statement that the petitioner will immediately withdraw the revision pending before the Divisional Joint Registrar. The statement is accepted. In the result, the writ petition is allowed. It is declared that the respondent no.1 Bank's claim for recovery of amount under the Recovery Certificate issued by the respondent no.2 for an amount of Rs. 17,45,379/- together with interest, stands fully satisfied as the petitioner has paid the entire amount. Over and above the amount covered by Recovery Certificate, the petitioner has paid a further amount of Rs. 1,49,904/-. The said payment has been made without prejudice to the petitioner's right to agitate in regard to the entitlement of the bank for the said sum. Payment of Rs. 1,49,904/- is accepted by the bank without prejudice to the petitioner's right to question the correctness thereof.

8. The auction sale held on 29-3-2005 wherein the respondent nos. 7 and 8 had offered to purchase the property for Rs. 23 lacs is quashed and set aside.

9. The petitioner's properties stand released from attachment made by the Recovery Officer of the respondent no.1 bank. Needless to mention that the revenue records shall be corrected in the light of this judgment. The respondent no.1 bank shall return the entire amount deposited by respondent nos.7 and 8 pursuant to the auction held on 29-3-2005 to the respondent nos.7 and 8 within one week from today. Rule made absolute in the above terms.

10. Civil Application filed by respondent nos. 7 and 8 seeking deletion of their names from the array of respondents is rejected.

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